STATE OF RHODE ISLAND

WASHINGTON, SC. **SUPERIOR COURT**

[Filed: November 13, 2020]

29 SYLVAN, LLC; and	:	
33 SYLVAN, LLC,	:	
Plaintiffs,	:	
	:	
v.	:	**C.A. No. WC-2020-0112**
	:	
THE TOWN OF NARRAGANSETT,	:	
CHRISTINE SPAGNOLI, in her capacity	:	
as Narragansett Finance Director,	:	
ANTHONY L. SANTILLI, JR., in his	:	
official capacity as the Narragansett Building	:	
Official,	:	
Defendants.	:	

DECISION

TAFT-CARTER, J. Before this Court is a motion for injunctive relief by the Plaintiffs, 29 Sylvan, LLC and 33 Sylvan, LLC (collectively Plaintiffs). The Defendants—the Town of Narragansett (the Town), Christine Spagnoli, in her capacity as Narragansett Finance Director, and Anthony L. Santilli, Jr., in his official capacity as the Narragansett Building Official (collectively Defendants)—object to Plaintiffs' motion. Jurisdiction is pursuant to G.L. 1956 §§ 8-2-13, 8-2-14, and 9-30-1, as well as Rule 65 of the Superior Court Rules of Civil Procedure.

I

Facts and Travel

Plaintiffs are the owners of abutting parcels of property located at 29 and 33 Sylvan Road, Narragansett, Rhode Island, identified respectively as Lots 29 and 30 on Plat S (collectively the Property). (Verified Compl. ¶¶ 1-2.) Both parcels are located in an R-10 zone. *Id.* ¶¶ 14, 22. The parcels were purchased for the purpose of demolishing and rebuilding a single-family residence at

29 Sylvan Road, and for significantly remodeling an existing single-family residence at 33 Sylvan Road. *Id.* ¶¶ 13, 24. The proposed development plan for the Property, located in the Eastward Look neighborhood of Narragansett, involves the creation on each parcel of an eight-bedroom single-family residence. *Id.* ¶¶ 13, 21. Plaintiffs have alleged that they each have "a high-interest construction loan for construction of their planned single-family homes." *Id.* ¶ 11.

Plaintiffs submitted their applications for building permits to the Town of Narragansett in September and December 2019, respectively. *Id.* ¶¶ 13, 21. The construction of a single-family detached dwelling is permitted in an R-10 zone. *Id.* ¶¶ 15, 23. As part of the application, the Town required 29 Sylvan, LLC to obtain a building permit as well as a demolition permit to complete the project. *Id.* ¶ 16. According to Plaintiffs, the Town acknowledged that the application for the demolition permit was complete, but, due to the passage of the emergency ordinance at issue in this case, the Town did not initially issue that permit to Plaintiffs. *Id.* ¶ 17.

On January 6, 2020, a group of citizens voiced their concerns about the proposed projects to the Town Council at a meeting. *Id.* ¶¶ 30-35. Following the meeting, Captain Kevin R. Tuthill of the Narragansett Fire Department sent a letter to Chief Scott M. Partington of the Narragansett Fire Department regarding the rental of large single-family houses in the Town. *Id.* ¶ 26. The letter stated Captain Tuthill's opinion that residences with six or more bedrooms being rented should have their classification changed for fire code purposes. *Id.* On January 13, 2020, Town Council member Richard Lema introduced a resolution to adopt an emergency ordinance providing for a moratorium on building and development. *Id.* ¶ 36, Ex. C. The Town Clerk, on January 16, 2020, published an Agenda concerning the Motion to Adopt "An Emergency Ordinance of the Town of Narragansett Providing for a Moratorium on Building and Development, Under the Provisions of

Section 2-1-9(b) of the Town Charter" (Emergency Ordinance). *Id.* ¶ 37, Ex. D. No other public notice was made regarding the Emergency Ordinance.

On January 21, 2020, the Town Council considered and passed the Emergency Ordinance. *Id.* ¶ 42, Ex. C. The Emergency Ordinance listed a number of findings, including the following: "residential areas of the town are under threat of excessive impact as a result of the construction of single-family homes with six or more bedrooms with the sole purpose of renting these residences for profit"; "[t]here is continued intent to construct large residences, identified as single-family dwellings, with six or more bedrooms for the purpose of operating commercial enterprises"; and "[t]hese additional bedrooms are being rented for periods as brief as one night, and as long as one year." *Id.* at Ex. C (Emergency Ordinance, Findings B, D, E). The Emergency Ordinance therefore mandated that:

> "For the period of sixty (60) days following the passage of this ordinance, all Town agencies and all Town employees shall neither accept, process, approve, deny or in any way act upon any new or incomplete application, plan, permit, license and/or fee for any new construction or use governed by this emergency ordinance for said period of time." *Id.* § 4.

Following the enactment of the Emergency Ordinance, Plaintiffs received correspondence from the Town that their plans could not move forward because of the Emergency Ordinance. (Verified Compl. ¶ 18.)

Ten days after the enactment of the Emergency Ordinance, on January 31, 2020, in another proceeding before this Court, the Town entered into a Consent Order concerning its enforcement of the Emergency Ordinance going forward. *Hayes v. Town of Narragansett*, C.A. No. WC-2020-0047, Jan. 31, 2020.[1] The Town agreed by virtue of the Consent Order that it would not enforce

[1] In *Hayes*, the plaintiffs were two individuals who intended to build single-family homes on parcels that they had recently purchased in Narragansett. Verified Compl. ¶ 3, WC-2020-0047.

the Emergency Ordinance pertaining to restriction of the issuance of building permits in areas zoned R-40 or R-80. *Id.* at Ex. E. Further, the Town agreed not to enforce the Emergency Ordinance regarding the issuance of building permits for new structures that have four or fewer bedrooms or for existing structures to expand to a maximum of four bedrooms. *Id.*

On March 2, 2020, the Town voted to send to the Planning Board proposed changes to the Town's zoning ordinances for review, recommendation, and public hearing (the Bulk Zoning Amendments). (Pls.' Mem. at 4.) The Bulk Zoning Amendments would limit the size of residences based on a concept known as "floor-area ratio," which bases the maximum size of the residence on the size of the lot on which it sits. *See* Defs.' Suppl. Mem. Supp. Obj. Pls.' Mot. for Injunctive Relief (Defs.' Suppl. Mem.) Ex. 7, Bulk Zoning Amendments, changes to § 6.4. The Town Planning Board began considering the Bulk Zoning Amendments on March 9, 2020. (Defs.' Suppl. Mem. at 8-9.) Despite Governor Raimondo issuing an Executive Order on March 16, 2020, exempting only "essential functions" of governmental bodies from the normal requirements of the Open Meetings Act through Rhode Island Executive Order No. 20-05, the Planning Board recommended passage of the Bulk Zoning Amendments on March 23, 2020, subject to further

They filed a verified complaint on January 30, 2020, which largely mirrors the Plaintiffs' Verified Complaint in the present case, alleging that the Emergency Ordinance was void because it was overbroad, was not enacted in compliance with the Town's Charter, was not in compliance with the Rhode Island General Laws, was an interference with contract, and violated those plaintiffs' rights to due process. *See generally id.* One day after the complaint was filed, the parties entered into a consent order wherein the defendants agreed that the Town would "not enforce the provisions of the Emergency Moratorium Ordinance as it pertains to the restrictions on the issuance of building permits in areas zoned R-40 or R-80." Consent Order, WC-2020-0047 (Jan. 31, 2020). The Consent Order also provided that "[t]he Emergency Moratorium Ordinance shall not apply to the issuance of building permits allowing new structures that are four or less bedrooms, or building permits for existing structures seeking approval to increase the number of bedrooms to a maximum of four." *Id.*

review by the Town engineer. *See* Pls.' Mem. Further Supp. Mot. Injunctive Relief (Pls.' Mem.) at 5; Defs.' Suppl. Mem. at 9.

In the meantime, Plaintiffs had filed a seven-count Verified Complaint in this case on March 4, 2020, alleging that the Town violated their rights to equal protection, substantive due process, and procedural due process under the Rhode Island Constitution, and seeking declaratory and injunctive relief. Plaintiffs ask for a declaration (1) that the moratorium is void as a matter of law because the Town did not have the authority to impose the moratorium under G.L. 1956 § 45-22.2-13(e); (2) that the Town failed to provide the plaintiffs proper notice pursuant to § 45-22.2-13(e); (3) that the Town did not have an "emergency" as required under the emergency ordinance procedure under the Town charter; and (4) that the Town does not have authority to pass ordinances on the subject matter covered in the Emergency Ordinance.

On March 5, 2020, Plaintiffs filed a motion for injunctive relief and a memorandum in support thereof. Defendants filed an objection and a supporting memorandum. The parties appeared at a hearing before this Court on March 26, 2020 via WebEx. Following the hearing, this Court issued a temporary restraining order which prohibited the Town from holding further hearings on the Bulk Zoning Amendments and which instructed the parties to maintain the status quo until further hearings could be held before this Court. *See* Order (June 11, 2020) (Taft-Carter, J.).

In the interim, the Town's Engineering Department sent correspondence to Plaintiffs on March 17, 2020, providing information, for the first time, regarding the Town's comprehensive analysis of the 33 Sylvan's Building Permit Application. *See* Pls.' Mem. at 5. At the end of the sixty-day period set forth in the Emergency Ordinance on March 20, 2020, the Town Council held a special meeting at which it voted to extend the moratorium. *Id.* at 6, Exs. H and I. After Plaintiffs

provided clarification on matters regarding their building permit applications, such as a previously withdrawn request for an administrative subdivision, the Town sent further correspondence on May 5, 2020, indicating to Plaintiffs some items that the Town considered outstanding from their applications. *Id.* at 7, Exs. L and M. That is, the Town worked with Plaintiffs to move the applications forward, despite the existence of the Emergency Ordinance. Defs.' Suppl. Mem., Ex. 2 at 88-89. Defendant Santilli admitted at his deposition that he had "receive[d] direction to continue the review" of Plaintiffs' applications, despite the building moratorium mandate contained in the Emergency Ordinance. *Id.*

On August 12, 2020, a hearing was held by this Court via WebEx to consider Plaintiffs' motion for a preliminary injunction preventing the enforcement of the Emergency Ordinance and requiring the Town to process and/or issue Plaintiffs' building permits. (Pls.' Mem. at 26.) Prior to the hearing, the parties filed supplemental memoranda in support of their respective positions. The Court will now render its decision.

II

Standard of Review

Rule 65 of the Superior Court Rules of Civil Procedure provides the Court the ability to grant temporary injunctive relief, and the decision to grant or deny injunctive relief is left to the sound discretion of the trial justice. *Hagenberg v. Avedisian*, 879 A.2d 436, 441 (R.I. 2005). "[I]n deciding whether to issue a preliminary injunction, the hearing justice should determine whether the moving party (1) has a reasonable likelihood of success on the merits, (2) will suffer irreparable harm without the requested injunctive relief, (3) has the balance of the equities, including the possible hardships to each party and to the public interest, tip in its favor, and (4) has shown that the issuance of a preliminary injunction will preserve the status quo." *Iggy's Doughboys, Inc. v.*

Giroux, 729 A.2d 701, 705 (R.I. 1999) (citing *Fund for Community Progress v. United Way of Southeastern New England*, 695 A.2d 517, 521 (R.I. 1997)).

A plaintiff need not demonstrate certainty of success; rather, she or he need only make out a prima facie case. *Fund for Community Progress*, 695 A.2d at 521 (citing *Coolbeth v. Berberian*, 112 R.I. 558, 564, 313 A.2d 656, 660 (1974)). "Prima facie evidence is [considered the] amount of evidence that, if unrebutted, is sufficient to satisfy the burden of proof on a particular issue." *Paramount Office Supply Company, Inc. v. D.A. MacIsaac, Inc.*, 524 A.2d 1099, 1101 (R.I. 1987) (citing *Nocera v. Lembo*, 121 R.I. 216, 218, 397 A.2d 524, 526 (1979)). If the moving party can establish a likelihood of success on the merits and an immediate irreparable injury, the Court should examine the equities of the case by analyzing the hardship to the moving party if the injunction is not granted, the hardship to the nonmoving party if the injunction is granted, and the public interest in granting or denying the injunction. *Id.* at 1102 (citing *In re State Employees' Unions*, 587 A.2d 919, 925 (R.I. 1991)).

III

Analysis

Plaintiffs argue that they are entitled to injunctive relief enjoining the enforcement of the Emergency Ordinance because the Emergency Ordinance violates the Rhode Island Constitution, the Town's home rule charter, and the Rhode Island General Laws. (Pls.' Mem. at 1.) They contend that they have established a likelihood of success on the merits and the possibility of irreparable harm. Plaintiffs also request that the Court order Defendants to issue the requested building permits, arguing that they have complied with the items addressed in the Town's May 5, 2020 letter that outlined the outstanding items on the applications. *Id.* at 24-25.

A

Likelihood of Success on the Merits

1

Constitutional Claims

Plaintiffs allege in Counts I, II, and III of their Verified Complaint that the enactment of the Emergency Ordinance violates their rights to equal protection, substantive due process, and procedural due process, respectively. "When a party challenges the constitutionality of a statute, the burden is on him or her to demonstrate that the enactment is unconstitutional beyond a reasonable doubt." *Federal Hill Capital, LLC v. City of Providence, by and through Lombardi*, 227 A.3d 980, 984 (R.I. 2020) (citing *Gem Plumbing & Heating Co., Inc. v. Rossi*, 867 A.2d 796, 808 (R.I. 2005)); *see State v. Capone*, 115 R.I. 426, 432, 347 A.2d 615, 619 (1975) ("Statutes enacted by the General Assembly are presumed to be constitutional in form and in application[.]"); *State v. Lerner*, 112 R.I. 62, 88, 308 A.2d 324, 340 (1973) ("[I]t is well settled that state legislatures are presumed to have acted within their constitutional powers[.]").

a

Equal Protection and Substantive Due Process Claims

Plaintiffs allege that the Town "intentionally targeted" Plaintiffs to prevent their specific projects, in violation of their right to equal protection of the laws under article I, section 2 of the Rhode Island Constitution. (Verified Compl. ¶ 56.) Specifically, Plaintiffs allege that "the Town has intentionally treated the Plaintiffs differently than other property owners . . . without any rational basis for the protection of the health, safety, and welfare of the public[,]" because "any alleged fire safety concerns posed by the fire department with houses regarding six or more bedrooms, exists at any six[-]bedroom house regardless of whether it is located in an R-l0, R-l0A,

R-40, or R-80 zone." *Id.* ¶ 65. Plaintiffs point out that, pursuant to the January 31, 2020 Consent Order, the Town "began treating construction on property of single-family homes of five or more bedrooms in R-40 or R-80 zones differently than construction on property of single-family homes of five or more bedrooms on properties zoned as R-l0, R-l0A, and R-20." *Id.* ¶ 58. According to Plaintiffs, "[s]uch disparate treatment is a gross abuse of power as there is no rational basis for the Town's actions." *Id.* ¶ 67.

As for their claim that they were denied substantive due process, Plaintiffs claim that the passage of the moratorium was "arbitrary and unreasonable" and denied them of their "fundamental right" to receive building permits because their applications were complete. *Id.* ¶¶ 77, 89. Plaintiffs allege that they have never been allowed an opportunity to be heard regarding the moratorium or the Town's refusal to issue their building permits. *Id.* ¶¶ 79, 80. They assert that the Defendants assumed Plaintiffs would be using the properties for rentals, the Defendants knew they would issue the moratorium before the hearing on the Emergency Ordinance, and the moratorium has "no substantial relation to the public health, safety, morals, or general welfare of the Town or its citizens." *Id.* ¶¶ 83, 84. They highlight that the letter of the fire department does not support any risk to the public health, safety, morals or general welfare, and that the moratorium was refined by the Consent Order "to allow some building permits, but was still used to prevent the issuance of a building permit for the Plaintiffs." *Id.* ¶¶ 85, 86. They assert that, because their "building permit application was complete, the Plaintiff[s] have a fundamental right to such building permit prior to the approval of the Emergency Ordinance[,] but that the "Town has refused to issue building permits [and a demolition permit for 29 Sylvan, LLC] in a sign of their animus and ill will towards the Plaintiffs." *Id.* ¶¶ 89, 90, 91. They therefore allege that "[t]he Town's

actions were without actual or legal basis and deprived Plaintiffs of their due process rights." *Id.* ¶ 92.

The Rhode Island Supreme Court has recently held that when an ordinance "does not discriminate on the basis of a suspect classification, the proper level of constitutional review is rational basis review." *Federal Hill Capital, LLC*, 227 A.3d at 991; *see Kaveny v. Town of Cumberland Zoning Board of Review*, 875 A.2d 1, 11 (R.I. 2005) ("It is well established that where it has not been shown that a 'fundamental right' has been affected or that the legislation sets up a 'suspect classification,' a statute will be invalidated . . . only if the classification established bears no reasonable relationship to the public health, safety, or welfare." (quoting *Sweetman v. Town of Cumberland*, 117 R.I. 134, 151, 364 A.2d 1277, 1288 (1976))); *see also Wine & Spirits Retailers, Inc. v. Rhode Island*, 418 F.3d 36, 53 (1st Cir. 2005) ("When economic legislation neither employs suspect classifications nor infringes on fundamental rights, the legislation need only survive rational basis scrutiny." (citing *Hodel v. Indiana*, 452 U.S. 314, 331 (1981))). Therefore, because the Emergency Ordinance does not employ a suspect classification or infringe on a fundamental right, the Court will consider Plaintiffs' likelihood of success on their equal protection claim under a rational basis standard. *See id.*

The Supreme Court recognized in *Federal Hill* that, "[i]n the equal protection context, if 'a rational relationship exists between the provisions of the statute [or ordinance] and a legitimate state interest[,]' the legislative action does not offend the Equal Protection Clause." *Federal Hill Capital, LLC*, 227 A.3d at 991 (quoting *Riley v. Rhode Island Department of Environmental Management*, 941 A.2d 198, 206 (R.I. 2008)). The Supreme Court went on in *Federal Hill* to recognize that if the court "'can conceive of any reasonable basis to justify the classification, [it] will uphold the statute as constitutional.'" *Id.* (quoting *Mackie v. State*, 936 A.2d 588, 596 (R.I.

2007)). The Court recognized that "'even if the Legislature had a constitutionally improper motive when it passed legislation, the legislation would still hold up to rational basis scrutiny if [the] Court could find any legitimate objective.'" *Id.* (quoting *Mackie*, 936 A.2d at 596). "'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.'" *Id.* (quoting *Mackie*, 936 A.2d at 597).

Therefore, to ultimately succeed on the merits of this case, Plaintiffs must, under the standard explained in *Federal Hill*, meet "a very high bar" of proving beyond a reasonable doubt that "'the legislative classification rests on grounds wholly irrelevant to the achievement'" of the Town's objective, and "'to negative every conceivable basis which might support'" the Emergency Ordinance. *Id.* (second and third quotations quoting *Mackie*, 936 A.2d at 597).

Further, "[t]he substantive component of due process 'guards against arbitrary and capricious government action.'" *East Bay Community Development Corp. v. Zoning Board of Review of Town of Barrington*, 901 A.2d 1136, 1150 (R.I. 2006) (quoting *Brunelle v. Town of South Kingstown*, 700 A.2d 1075, 1084 (R.I. 1997)). To prevail on such a claim, a litigant must show that implementation of the statute was "'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.'" *Cherenzia v. Lynch*, 847 A.2d 818, 826 (R.I. 2004) (quoting *Brunelle*, 700 A.2d at 1084); *see Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). The Supreme Court in *Federal Hill* also held that "should the Equal Protection Clause be satisfied . . . then the Due Process Clause is not implicated because, again pursuant to rational basis review, it follows that the statute cannot be deemed to be arbitrary." *Id.*

Defendants contend that the Emergency Ordinance was "enacted to preserve the status quo while the Town considered ways to address the growing threat posed by large, high density

structures that were being erected for the purpose student rentals in residential neighborhoods." Defs.' Suppl. Mem. at 1. They argue that "the Town was well within its rights under its own ordinances, and state statutes to impose a pause in construction while it addressed the threats posed from the replacement of modest single family homes with enormous, dorm-like structures for rental purposes." *Id.* at 2. Defendants assert that "the Town's actions were legitimate, and taken in response to complaints by a large group of residents, led by the Eastward Look Homeowners' Association." *Id.* at 14. They allege that "contrary to the Plaintiffs suggestions, the emergent situation that led to the Building Moratorium was not merely the long-time issue with rowdy and disorderly student parties. Rather, the new issue confronting the Town is the erection of massive, dorm-like houses both on vacant lots, and as 'tear downs.'" *Id.* at 15.

While Defendants admit that "the Building Moratorium may not address every possible scenario or threat with laser precision," they allege that "it is rationally related to the legitimate Town interest of preserving the safety and peace of the general public, as well as preserving the quiet enjoyment of the homes of the Town's residents." (Defs.' Mem. at 11.) Defendants also point to the Emergency Ordinance's "limited duration of several months[,]" arguing that it is "narrowly tailored to address the Town's need to hold the line while it evaluates its options." *Id.* Defendants assert that the Emergency Ordinance is "rationally related to the legitimate goal of preserving the status quo to address the serious issues confronting the Town[,]" and therefore "it survives equal protection and substantive due process scrutiny." *Id.*

However, this Court finds that the evidence before the Court, including Defendants' own admissions, supports a likelihood of success on Plaintiffs' equal protection and substantive due process claims. Defendants admit that the Town "has had a long standing issue with the use of residential properties as student rentals, and the resulting safety, density, and quality of life

problems for neighbors[,]" and therefore Defendants agree with Plaintiffs' allegation in their Verified Complaint that the '"Town has enacted various ordinances in an effort to address rentals, including but not limited to a noise ordinance, a keg ordinance, a public nuisance ordinance, and a rental ordinance."' Defs.' Mem. at 3 (quoting Verified Compl. ¶ 12.) Despite these efforts, Defendants say, "the Town continues to have constant issues during the academic year with disruptive gatherings, underage drinking, littering, noise complaints, and other problems related to the overcrowding of residential properties with college students[,]" and "[t]here have also been concerns voiced by the Fire Department related to fire safety in the crowded conditions created by residential structures with six or more bedrooms[.]" *Id.*

Therefore, Defendants, in the section of their memorandum explaining the enactment of the Emergency Ordinance, explain that "[i]n early January of this year . . . the Plaintiffs' plans to build eight—bedroom rental housing on the Sylvan Properties came to the attention of the Town Council." *Id.* Defendants go on to state that: "Although there have been prior, and current efforts by investors to expand existing structures, or legalize additional bedrooms for rental investment purposes, *the Plaintiffs' proposal was significantly more ambitious in its scope, and consequently the threat to the Town's and neighbors' interests* (emphasis added). Accordingly, a motion was placed on the Agenda for the Town Council Meeting for January 21, 2020, seeking to . . . place a moratorium on the issuance of building permits for a period of sixty days while the Town evaluated options to address the problems surrounding the conversion of single family residential properties into massive student rental operations." *Id.* at 3-4.

It is abundantly clear to this Court that the Emergency Ordinance was created in response to the neighboring property owners' complaints about the Plaintiffs' proposed development, which project the Narragansett Town Council President characterized as so "egregious" in its scale that

it was the "straw that broke the camel's back." *See* Defs.' Suppl. Mem. at 6. Despite the acknowledgment by a Town Council member that the issues confronting the Town had existed for "for the last twenty years at least if not even longer[,]" Verified Compl. ¶ 44, it was undisputedly Plaintiffs' proposed development of the Property that prompted the Town Council to place a motion on the Town Council agenda "seeking to . . . place a moratorium on the issuance of building permits[.]" Defs.' Mem. at 4. The Emergency Ordinance was in response to Plaintiffs' proposed "ambitious" development, and not in response to an actual imminent serious threat to the general "'public health, safety, or welfare.'" *Kaveny*, 875 A.2d at 11 (quoting *Sweetman*, 117 R.I. at 151, 364 A.2d at 1288).

Municipalities are armed with the authority to establish comprehensive plans and to enact ordinances to address the concerns that Defendants' complaint of: "disruptive gatherings, underage drinking, littering, noise complaints, and other problems related to the overcrowding of residential properties with college students." (Defs.' Mem. at 3.) The evidence in this case demonstrates that the Town suffered from longstanding concerns in this respect, relating to its status as a college town, not unsimilar to the concerns expressed by the City of Providence in the *Federal Hill* case, cited *supra*. However, Defendants have not established a rational basis for this specific Emergency Ordinance at this specific time; instead, what Defendants have established is the Town's own prior failure to deal with the ills related to the rental of properties to college students, that the neighbors and citizens of Narragansett were angry about that failure, and that, in the face of the Plaintiffs' "ambitious" proposed development, the building moratorium was enacted. And, to add insult to injury, just ten days later, Defendants entered into a Consent Order with two other developers in the Town, agreeing that Defendants "began treating construction on property of single-family homes of five or more bedrooms in R-40 or R-80 zones differently than construction on property

of single-family homes of five or more bedrooms on properties zoned as R-l0, R-l0A, and R-20." (Verified Compl. ¶ 58.)

Plaintiffs have made a prima facie showing that implementation of the Emergency Ordinance was '"clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."' *Cherenzia*, 847 A.2d at 826 (quoting *Brunelle*, 700 A.2d at 1084). Plaintiffs have demonstrated, by Defendants' own admission, that the enactment of the Emergency Ordinance was instead for the purpose of halting Plaintiffs' proposed developments in response to the complaints of the neighbors. Therefore, Plaintiffs have demonstrated a likelihood of success on their equal protection and substantive due process claims.

b

Procedural Due Process Claim

Plaintiffs' claim regarding procedural due process is based on its lack of notice regarding the promulgation of the Emergency Ordinance, which resulted in an adverse impact on their property rights. Verified Compl. ¶¶ 95-96. Plaintiffs specifically allege that they "did not receive notice of the hearing of the Moratorium via Emergency Ordinance by first class mail as expressly required by R.I. Gen. Laws § 45-22.2-13(e)(2), even though the Town, the Narragansett Town Council, and the Narragansett Building Inspector knew of the Plaintiffs' addresses, as each had a pending building permit application." *Id.* ¶ 95. They allege also that they "were the only applicants for building permits with proposed single-family homes of six or more bedrooms[,]" and that the Town knew Plaintiffs had submitted their Applications prior to the enactment of the Emergency Ordinance. *Id.* ¶¶ 97, 98. They allege that "[t]he Town's actions . . . were wrongful and arbitrary, egregious, made with animus and bias against the Plaintiffs, amongst others, as developers of single-family homes, and without actual or legal basis and deprived Plaintiffs of their due process

rights." *Id.* ¶ 99. They assert that, under the Rhode Island Constitution, they "are entitled to a meaningful opportunity to be heard in any matter involving the Plaintiff s property rights[,]" and that they "have a fundamental right to use of their property and to receive a building permit." *Id.* ¶¶ 100, 101.

The Rhode Island Supreme Court has said that, "[u]nder the Rhode Island Constitution, procedural due-process protections are grounded in article 1, section 2, which states that '[n]o person shall be deprived of life, liberty, or property without due process of law[.]'" *Moreau v. Flanders*, 15 A.3d 565, 587-88 (R.I. 2011). "Procedural due process ensures that notice and an opportunity to be heard precede any deprivation of a person's life, liberty, or property." *Id.* at 588 (citing *State v. Germane*, 971 A.2d 555, 574 (R.I. 2009) (citing *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541 (1985))). Procedural due-process issues involve a two-step analysis. *DiCiantis v. Wall*, 795 A.2d 1121, 1126 (R.I. 2002). "First, a plaintiff must have a protected liberty or property interest." *Id.* "Then, the next inquiry turns on whether the procedures afforded to the plaintiff were 'constitutionally sufficient.'" *Mosby v. Devine*, 851 A.2d 1031, 1074 (R.I. 2004) (quoting *DiCiantis*, 795 A.2d at 1126). "This two-step analysis requires the Court to balance the burdens and interests of the government and the interests of the party raising a procedural due-process concern." *Id.* (citing *Millett v. Hoisting Engineers' Licensing Division of Department of Labor*, 119 R.I. 285, 295, 377 A.2d 229, 235 (1977)).

As discussed *infra*, § 45-22.2-13(e) applies in this case and requires that notice of the proposed moratorium should have been provided by first-class mail to affected property owners at least fourteen days prior to the public hearing concerning the moratorium. However, Plaintiffs, property owners with pending building permit applications that were—as established *supra*—the impetus for the Town Council member's motion to enact the moratorium, and the Town Council's

subsequent adoption of the Emergency Ordinance, were not provided with such notice. However, there is a question as to the nature of the deprivation of Plaintiffs' property interest in this case. Plaintiffs do not have a guaranteed interest in the granting of building permits, as there are many steps in that process. The deprivation alleged has been the Town's failure to consider the building permit applications. It is suggested that this question precludes this Court's ability to determine with certainty, at this early stage, that Plaintiffs have a likelihood of success on their procedural due process claim.

2

Home Rule Charter

Count VI of Plaintiffs' Verified Complaint seeks a declaration that the Emergency Ordinance is "void and *ultra vires* as there is no emergency[.]" (Verified Compl. at 23). Plaintiffs allege that "[t]he adoption of the Emergency Ordinance conflicts with Rhode Island General Laws, which do not permit an 'Emergency Ordinance' to circumvent state law." *Id.* Plaintiffs argue in support of injunctive relief that the Home Rule Charter of the Town of Narragansett does not give the Town "the specific authority to pass a moratorium with respect to land use approvals or building permits, but merely allows, under certain circumstances, the Town to pass an Ordinance on an emergency basis." *See* Pls.' Mem. at 9 (July 28, 2020). Plaintiffs claim that in this case, "there is no overlap between the Charter and the enabling statute because the latter provides specific terms." *Id.* In particular, Plaintiffs cite to the Rhode Island Comprehensive Planning and Land Use Regulation Act (the Act), chapter 22.2 of title 45 of the General Laws, which, according to Plaintiffs, "applies to all cities and towns equally and establishes identical requirements to all municipalities[,]" and includes a moratorium provision at § 45-22.2-13(e). *Id.* at 9-10. Therefore, Plaintiffs argue that "the Town cannot rely on its charter to limit land use approvals and building

permits by and through a moratorium as to the same, because such is governed by [the Act]. To do so would contradict state law." *Id.* at 11.

As the Rhode Island Supreme Court recently explained, "[i]n 1951, the General Assembly enacted the Home Rule Amendment to the Rhode Island Constitution, granting to municipalities 'the right to self government in all local matters.'" *K & W Automotive, LLC v. Town of Barrington*, 224 A.3d 833, 836-37 (R.I. 2020) (quoting R.I. Const., art. XIII, § 1). Section 2 of article XIII of the Rhode Island Constitution states that:

> "Every city and town shall have the power at any time to adopt a charter, amend its charter, enact and amend local laws relating to its property, affairs and government not inconsistent with this constitution and laws enacted by the general assembly in conformity with the powers reserved to the general assembly."

Pursuant to its authority under the Home Rule Amendment, the Town adopted the Charter of the Town of Narragansett, Rhode Island, which expressly provides:

> "In an emergency affecting the public peace, health, safety, comfort and welfare of the inhabitants of the town and for protection of persons and property, the town council by an affirmative vote of three (3) members may adopt, on the day of its introduction, an ordinance containing a declaration of emergency which shall take effect upon its passage. The nature of the emergency shall be specifically stated in the ordinance and such declaration shall be conclusive as to the existence of such an emergency. Every emergency ordinance shall automatically stand repealed as of the sixty-first day following the date on which it was adopted; but this shall not prevent reenactment of the ordinance in the manner specified in this section if the emergency still exists." Town of Narragansett Charter, § 2-1-9(b).

It is under § 2-1-9(b) of its Charter that the Town adopted the Emergency Ordinance, citing to the following reasons as the basis for the emergency:

> "The rapid development of single-family dwellings with six or more bedrooms being built and/or utilized to maximize income by renting out bedrooms for periods ranging from one night to one year is

> creating a situation where public peace, health, safety, comfort and welfare of the town's inhabitants are being threatened.
>
> "This rapid expansion of use and occupation has resulted in an emergency situation wherein interim restrictions on building are necessary for the Town to prepare and implement appropriate policies and ordinances." Emergency Ordinance §§ 2, 3.

The Town maintains that the enactment of the Emergency Ordinance was in compliance with § 2-1-9(b) of its Charter. *See* Defs.' Suppl. Mem. at 16-18. First, the Town argues that, by virtue of the language of the Charter that "[t]he nature of the emergency shall be specifically stated in the ordinance and such declaration shall be conclusive as to the existence of such an emergency[,]" the "mere declaration of an emergency by the Town Council is sufficient to support enactment." *Id.* at 17. Second, the Town asserts that the reasons are supported by the testimony and meet the dictionary definition of an "emergency." *Id.* at 17-18. In summation, the Town argues that "the urgent circumstances presented by the Sylvan projects, and others like it, met the parameters in the Charter requiring the finding and declaration of an emergency." *Id.* at 18.

It is axiomatic that a municipality has authority over subjects that are matters purely of local concern, *Town of East Greenwich v. O'Neil*, 617 A.2d 104, 111 (R.I. 1992) ("[C]ities and towns that have adopted home rule charters are free to exercise authority over purely local concerns[.]"), and matters over which the General Assembly has otherwise granted municipalities authority. *See O'Neil*, 617 A.2d at 111 ("A municipality, as a creation of the state, has only such powers as are delegated to it by the state."). Plaintiffs in the present case point to the General Assembly's grant of the authority to the Town to enact building moratoria pursuant to the Act, one of the stated goals of which is to "[t]o ensure that municipal land use regulations and decisions are consistent with the comprehensive plan of the municipality[.]" Section 45-22.2-3(c)(9). In particular, Plaintiffs cite to § 45-22.2-13(e) of the Act, which provides:

> "A one-time moratorium, for the purpose of providing interim protection for a planned future land use or uses, may be imposed during the twelve (12) months subsequent to the adoption of the local comprehensive plan provided that a change to the zoning ordinance and map has been identified and scheduled for implementation within twelve (12) months of plan adoption. The moratorium shall be enacted as an ordinance and may regulate, restrict, or prohibit any use, development, or subdivisions under the following provisions:
>
> "(1) The moratorium is restricted to those areas identified on the map or maps as required by paragraph 45-22.2-6(b)(2)(iii).
>
> "(2) A notice of the moratorium must be provided by first class mail to property owners affected by said moratorium at least fourteen (14) days in advance of the public hearing.
>
> "(3) The ordinance shall specify:
>
> "(i) The purpose of the moratorium;
>
> "(ii) The date it shall take effect and the date it shall end;
>
> "(iii) The area covered by the moratorium; and
>
> "(iv) The regulations, restrictions, or prohibitions established by the moratorium.
>
> "(4) The moratorium may be extended up to an additional ninety (90) days if necessary to complete a zoning ordinance and map change provided that: (i) The public hearing as required by § 45-24-53 has commenced; and (ii) The chief approves the extension based on a demonstration of good cause. Said extension shall not be deemed as non-conformance to the implementation schedule."

Here, the Act applies to all municipalities and is therefore "'an act of general application that supersedes a controverting home rule charter provision.'" *Munroe v. Town of East Greenwich*, 733 A.2d 703, 708 (R.I. 1999) (quoting *City of Cranston v. Hall*, 116 R.I. 183, 186, 354 A.2d 415, 417 (1976)). The Supreme Court has noted that "as a general rule, a state law of general character and statewide application is paramount to any local or municipal ordinance inconsistent therewith." *Mongony v. Bevilacqua*, 432 A.2d 661, 664 (R.I. 1981) (citing *Borromeo v. Personnel Board of Town of Bristol*, 117 R.I. 382, 385, 367 A.2d 711, 713 (1977); *Wood v. Peckham*, 80 R.I. 479, 482, 98 A.2d 669, 670 (1953)). Therefore, the Town's Home Rule Charter cannot authorize an action that would be inconsistent with the general laws. *See* R.I. Const. art. XIII, § 2; *see also*

O'Neill v. City of East Providence, 480 A.2d 1375, 1379 (R.I. 1984) ("The authority of a municipality to engage in self-government does not extend to enacting local laws that are inconsistent with those provisions of the general laws enacted in conformity with the Legislature's reserved powers." (citing *Marro v. General Treasurer of City of Cranston*, 108 R.I. 192, 195, 273 A.2d 660, 662 (1971))).

Plaintiff has therefore demonstrated that it has a likelihood of success on the merits of its claim that the Town Council's enactment of the Emergency Ordinance was not authorized by the Town of Narragansett's Home Rule Charter.

3

Rhode Island Comprehensive Planning and Land Use Act

Counts IV and V of Plaintiffs' Verified Complaint seek declarations that the Town had no authority to establish a moratorium for building permits and therefore the Emergency Ordinance is void *ab initio* and *ultra vires* in that it is not authorized under § 45-22.2-13(e) because the Town has not satisfied the statute's requirement that "a change to the zoning ordinance and map has been identified and scheduled for implementation[,]" *see* Verified Compl. at 17-19, and the Town failed to comply with the notice requirement contained in § 45-22.2-13(e)(2) when it enacted the moratorium, *id.* at 19-20. Plaintiffs argue in support of their request for injunctive relief that the Town lacked the legal authority to pass such a broad moratorium on building and development. *See* Pls.' Mem. at 8. They contend that the only legal avenue the Town could have taken to enact the Emergency Ordinance is § 45-22.2-13(e), and that Defendants failed to meet the substantive and procedural steps necessary to comply with that statute. *Id.* at 11, 16.

Defendants assert that Plaintiffs cannot complain about the Emergency Ordinance, in that Plaintiffs currently have no vested property right because their building permit applications are not

yet substantially complete. (Defs.' Mem. at 11-14.) Additionally, Defendants argue that the Town was authorized to enact the Emergency Ordinance based on, *inter alia*, the "urgent and unexpected situations" standard contained in § 45-22.2-13(d). Defs.' Suppl. Mem. at 18.

The Act was created by the General Assembly, along with the Zoning Enabling Act and the Land Development and Subdivision Review Enabling Act, as part of an effort to create a consistent scheme of land use regulation throughout the State in each municipality. Peter D. Ruggiero, Esq., *A Practical Guide to Land Use Law in Rhode Island* § 1.3 (MCLE) (2017). This scheme was enacted to move away from the days of "ad hoc and incremental municipal land use decisions that were widely viewed as constituting political favors given to supporters or otherwise being taken for improper reasons." *Id.* § 1.1. To that end, the Act requires each municipality to promulgate a comprehensive plan for land use in accordance with the substantive standards outlined by the General Assembly. Section 45-22.2-5. Strict compliance with the legislative mandates is required by all municipalities. Therefore, "[a]ll municipal land use decisions shall be in conformance with the locally adopted municipal comprehensive plan." Section 45-22.2-13(b).

a

Determining the Applicable Provision of the Act

A preliminary consideration involves Plaintiffs' argument that the only mechanism available to the Town to pass the Emergency Ordinance was § 45-22.2-13(e), cited *supra*. The Town argues, on the other hand, that the Emergency Ordinance was justified pursuant to § 45-22.2-13(d), which provides:

> "Limitations on land use approvals may be imposed according to the following provisions in addition to any other provision that may be required by law.
>
> "(1) Nothing in the chapter shall be deemed to preclude municipalities from imposing limitations on the number of building permits or other land use approvals to be issued at any

> time, provided such limitations are consistent with the municipality's comprehensive plan in accordance with this chapter and are based on a reasonable, rational assessment of the municipality's sustainable capacity for growth.
> "(2) In the event of a dire emergency not reasonably foreseeable as part of the comprehensive planning process, a municipality may impose a limitation on the number of building permits or other land use approvals to be issued at any time, provided that such limitation is reasonably necessary to alleviate the emergency and is limited to the time reasonably necessary to alleviate the emergency."

According to the Town, "Narragansett always had an uneasy, yet accepting relationship with URI students, who brought a lot of revenue and positive energy to the Town. However, the Town did not anticipate the recent trend of some ambitious investors tearing down small, summer, cottages, and erecting six or more bedroom houses." Defs.' Suppl. Mem. at 20. The Town argues that "Plaintiffs are proposing to build two, seven or eight bedroom houses on a quiet dead-end street—one of which on a 5,000 square foot lot (less than an eighth of an acre)." These are "just the type of 'unforeseen emergencies' that the General Assembly must have envisioned when it provided a relief mechanism to deal with contingencies that may arise in advancing the goals of a comprehensive plan." *Id.*

When engaged in statutory construction, this Court is directed to give effect to the plain meaning of a statute that is clear and unambiguous. *Western Reserve Life Assurance Co. of Ohio v. ADM Associates, LLC*, 116 A.3d 794, 798 (R.I. 2015) (quoting *Hough v. McKiernan*, 108 A.3d 1030, 1035 (R.I. 2015)). The ultimate goal of statutory construction "'is to give effect to the purpose of the act as intended by the Legislature.'" *Lang v. Municipal Employees' Retirement System of Rhode Island*, 222 A.3d 912, 915 (R.I. 2019) (quoting *Bluedog Capital Partners, LLC v. Murphy*, 206 A.3d 694, 699 (R.I. 2019)). "'When the language of a statute is clear and unambiguous, this Court must interpret the statute literally and must give the words of the statute

their plain and ordinary meanings.'" *Town of Exeter, by and through Marusak v. State*, 226 A.3d 696, 700 (R.I. 2020) (quoting *Lang*, 222 A.3d at 915). Additionally, this Court must "'consider the entire statute as a whole; individual sections must be considered in the context of the entire statutory scheme, not as if each section were independent of all other sections.'" *5750 Post Road Medical Offices, LLC v. East Greenwich Fire District*, 138 A.3d 163, 167 (R.I. 2016) (quoting *ADM Associates, LLC*, 116 A.3d at 798).

The plain language of § 45-22.2-13(e) permits a municipality to impose a building and development moratorium. The statute allows for "[a] one-time moratorium, for the purpose of providing interim protection for a planned future land use or uses[.]" Section 45-22.2-13(e). This one-time moratorium "may be imposed during the twelve (12) months subsequent to the adoption of the local comprehensive plan provided that a change to the zoning ordinance and map has been identified and scheduled for implementation within twelve (12) months of plan adoption." *Id.* The moratorium "shall be enacted as an ordinance"; it must be restricted to relevant areas identified on the zoning maps, § 45-22.2-13(e)(1); a notice of the moratorium must be provided by first class mail to property owners affected by said moratorium at least fourteen days prior to a public hearing regarding the moratorium, § 45-22.2-13(e)(2); and the ordinance enacting the moratorium must specify the purpose of the moratorium, the date it shall start and end, the area covered by the moratorium, and what regulations and restrictions are established by the moratorium, § 45-22.2-13(e)(3).

The Act also allows municipalities to place limitations on building and development pursuant to § 45-22.2-13(d), relied upon by the Town in its argument before this Court, arguing that it was confronted with a dire, unforeseen emergency that led to the enactment of the Emergency Ordinance. Municipalities are permitted to limit the number of building permits or

other approvals to be issued by a municipality at any given time, "provided such limitations are consistent with the municipality's comprehensive plan in accordance with this chapter and are based on a reasonable, rational assessment of the municipality's sustainable capacity for growth." Section 45-22.2-13(d)(1). In addition, municipalities are permitted to impose limitations on the number of building permits or other land use approvals at any time, "[i]n the event of a dire emergency not reasonably foreseeable as part of the comprehensive planning process . . . provided that such limitation is reasonably necessary to alleviate the emergency and is limited to the time reasonably necessary to alleviate the emergency." Section 45-22.2-13(d)(2).

The legislature used the term "moratorium" in § 45-22.2-13(e), but not in § 45-22.2-13(d). While the Act does not define "moratorium," that word has been defined as "[t]he suspension of a specific activity." Black's Law Dictionary 1210 (11th ed. 2019). Section 45-22.2-13(d) uses the word "limitation," and it specifically refers to limitations "*on the number of* building permits or other land use approvals[.]" (Emphasis added.) A "limitation" has been defined as "the quality, state, or condition of being limited" or "[a] restriction." Black's Law Dictionary 1114 (11th ed. 2019). These definitions are vastly different. It is clear from the plain language of § 45-22.2-13(d) that that section pertains only to a municipality's ability to *limit* the number of building permits; it does not authorize the imposition of a moratorium.[2]

[2] The difference between subsection (d) and subsection (e) of § 45-22.2-13 is clear when considering the rationale behind giving municipalities the ability to impose limitations and moratoria on development. Those two abilities are distinct and separate powers available to a municipality for use in two different scenarios. It has been said that the power to enact moratoria is generally premised on combatting "a potential rush to permits" when a municipality seeks to amend its comprehensive planning scheme. James A. Kushner, 1 Subdivision Law and Growth Management, *Moratoria—Other development moratoria* § 2.8 (2d ed. 2020). Moratoria, then, can be seen as a way for municipalities to ensure that development inconsistent with identified zoning amendments cannot be "rushed through" before the municipality can finalize its proposed changes. *See id.* It is for this reason that the General Assembly has set forth the requirement that moratoria must be for "providing interim protection for a planned future land use or uses" in § 45-22.2-13(e).

Here, the Emergency Ordinance is more than a restriction or limitation of the number of building permits issued. What is clear is that the Emergency Ordinance constitutes a moratorium, as the Town effectively has ordered a complete "suspension of a specific activity." *See* Emergency Ordinance § 4 (ordering that Town employees not "accept, process, approve, deny or in any way act upon *any* new or incomplete application, plan, permit, license and/or fee") (emphasis added); *see also* Black's Law Dictionary at 1210. Indeed, the Town called the Emergency Ordinance a "moratorium" in that very document, stating that "[t]he Town Council hereby finds that these circumstances create an emergency . . . requiring the immediate adoption of an emergency temporary *moratorium* ordinance on building and development for the preservation of public health, safety and welfare." (Emergency Ordinance at 1, Finding H (emphasis added).) Further, before this Court in support of its opposition to the issuance of a preliminary injunction, the Town continually refers to the Emergency Ordinance as a "moratorium" and, more specifically, "the Building Moratorium[.]" *See, e.g.*, Defs.' Suppl. Memo. at 1 ("Town's recent imposition of a building moratorium"); *id.* at 7 ("the Town enacted an emergency ordinance imposing a moratorium"); *id.* ("[a] copy of the Building Moratorium ordinance is appended hereto as Exhibit 6"); *id.* ("Mr. Mannix explained that the purpose of the Building Moratorium"); *id.* at 10 ("the Building Moratorium remains in effect"); *id.* at 15 ("the emergent situation that led to the Building

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Limitations on the number of building permits, on the other hand—a less drastic measure—do not carry with them requirements which are quite so strict. *Compare* § 45-22.2-13(d) *with* § 45-22.2-13(e); *see also* Amy H. Goins, Esq., Andrew M. Teitz, Esq., AICP and Michael A. Ursillo, Esq., *A Practical Guide to Land Use Law in Rhode Island* § 5.1.3 (MCLE) (1st ed. 2017) (specifying that § 45-22.2-13(e) "authorize[s] municipalities to impose moratoria, but only under carefully limited circumstances"). Therefore, there is clearly a distinction between a limitation and a moratorium. *See, e.g.*, *Home Builders Association of Maine, Inc. v. Town of Eliot*, 750 A.2d 566, 571-72 (Me. 2000) (distinguishing a complete moratorium from a mere limitation premised on providing for "orderly growth" within a municipality while still allowing a limited number of projects go forward).

Moratorium"); *id.* at 16 ("Capt. Tuthill's letter was cited by the Town Council during its consideration of the passage of the Building Moratorium.").

Thus, it is clear that the enactment of the Emergency Ordinance would fall under the purview of § 45-22.2-13(e), and not under § 45-22.2-13(d). The Court will therefore examine the requirements of § 45-22.2-13(e) to determine if the moratorium contained in the Emergency Ordinance was properly implemented under the Act.

b

Town's Compliance with § 45-22.2-13(e)

In Count IV of their Verified Complaint, Plaintiffs allege that, under § 45-22.2-13(e), "[t]he Town had no authority to establish a [m]oratorium for building permits and therefore the [m]oratorium is *void ab initio* and *ultra vires*." (Verified Compl. ¶ 113.) Plaintiffs therefore seek a declaration that "the Emergency Ordinance established by the Town is void and ultra vires[.]" *Id.* at 19.

Section 45-22.2-13(e) requires that the moratorium be "for the purpose of providing interim protection for a planned future land use or uses[.]" The Emergency Ordinance, by its own language, does not purport to be for the purpose of providing protection for any *planned future land use*. Instead, the rationale for the Emergency Ordinance was provided by the Town Council therein as: "The rapid development of single-family dwellings with six or more bedrooms being built and/or utilized to maximize income by renting out bedrooms for periods ranging from one night to one year is creating a situation where public peace, health, safety, comfort and welfare of the town's inhabitants are being threatened." (Section 2); and "This rapid expansion of use and occupation has resulted in an emergency situation wherein interim restrictions on building are necessary for the Town to prepare and implement appropriate policies and ordinances." (Section

3). Thus, the Town fails on this first requirement, that the moratorium provide "protection for any planned future land use[,]" which is necessary to enacting a legitimate moratorium under § 45-22.2-13(e). *Cf. Reagan v. City of Newport*, 43 A.3d 33, 38-39 (R.I. 2012) (where the General Assembly has enacted a statute granting a municipality authority to carry out a certain action, such action can be carried out "only by strict compliance with that statute").

Next, a moratorium under § 45-22.2-13(e) may only be imposed within the subsequent twelve months following the adoption of a municipality's comprehensive plan. The Town Council adopted the Town of Narragansett Comprehensive Plan on September 5, 2017. *See* Defs.' Suppl. Mem., Ex. 1. The Emergency Ordinance was adopted more than twelve months later, on January 21, 2020, and it therefore fails this requirement as well.

Therefore, it is suggested that Plaintiff has a likelihood of success on Count IV of its Verified Complaint, as the Town was not in compliance with the provisions of § 45-22.2-13(e) relating to both the purpose and timing of enactment of the Emergency Ordinance.

c

Town's Compliance with § 45-22.2-13(e)(2)

Section 45-22.2-13(e)(2) also requires that notice of the moratorium be provided by first class mail to affected property owners at least fourteen days prior to the public hearing concerning the moratorium. In Count V of their Verified Complaint, Plaintiffs seek a declaration that the Emergency Order is void as a matter of law based on Defendants' failure to properly notice the hearing on the Moratorium pursuant to § 45-22.2-13(e)(2). *See* Verified Compl. at 19. Plaintiffs have alleged that they "did not receive notice of the public hearing on the Moratorium by Emergency Ordinance by first class mail as expressly required" by that statute. *Id.* at 19-20. In addition, Plaintiffs contend that Defendants failed to comply with the notice requirements for

zoning ordinances in general, § 45-24-53, which mandates for notice by publication in the newspaper. (Pls.' Mem. Supp. Injunctive Relief at 18.)

Defendants have not disputed Plaintiffs' allegation that notice was not provided by first-class mail or by publication in a newspaper, but instead assert that Plaintiffs' reliance on § 45-22.2-13(e) at all is misguided because, they suggest, as discussed *supra*, that it is § 45-22.2-13(d) that applies and provides authority for Defendants' enactment of the Emergency Ordinance. (Defs.' Mem. at 12.) Defendants therefore argue that, "[i]n this regard, the Town was not required by due process or by statute to provide notice by mail to the Plaintiffs, as required in [§ 45-22.2-13(e)]." *Id.*

However, contrary to Defendants' assertion, as discussed *supra*, § 45-22.2-13(e) applies in this case; therefore, subsection (e)(2) of that statute requires that notice of the proposed moratorium should have been provided by first-class mail to affected property owners at least fourteen days prior to the public hearing concerning the moratorium. However, Plaintiffs, property owners with pending building permit applications that were—again, as established *supra*—undisputedly the impetus for the motion to enact the moratorium, were not provided with such notice. Consequently, the Town did not meet the notice requirements under § 45-22.2-13(e).

In addition, § 45-22.2-13(e)(3)(ii) requires that an ordinance that enacts a moratorium specify an effective date as well as an end date. An end date that is specified may be extended for up to ninety days "if necessary to complete a zoning ordinance and map change" following a public hearing and upon a demonstration of good cause. Section 45-22.2-13(e)(4). The Emergency Ordinance provides that it would be effective on the day of passage—January 21, 2020—and continue in effect for sixty days. On March 20, 2020, the Town Council voted to extend the moratorium for an unspecified period of time. This extension was not in compliance with the

statutory requirements for an extension provided in § 45-22.2-13(e)(4). As such, Plaintiffs have demonstrated a reasonable likelihood of success on the merits of Count V of their Verified Complaint because, although § 45-22.2-13(e) provides municipalities with the authority to enact moratoria, the Town failed to meet the requirements set out in § 45-22.2-13(e)(2) regarding notice.

B

Irreparable Harm

The second element that a Plaintiff must demonstrate when seeking injunctive relief is that it will suffer immediate irreparable harm for which there is no adequate remedy at law. *Brown v Amaral*, 460 A.2d 7, 10 (R.I. 1983) (citing *Rhode Island Turnpike & Bridge Authority v. Cohen*, 433 A.2d 179, 182 (R.I. 1981)). "A party seeking injunctive relief 'must demonstrate that it stands to suffer some irreparable harm that is presently threatened or imminent and for which no adequate legal remedy exists to restore that plaintiff to its rightful position.'" *Nye v. Brousseau*, 992 A.2d 1002, 1010 (R.I. 2010) (quoting *National Lumber & Building Materials Co. v. Langevin*, 798 A.2d 429, 434 (R.I. 2002) (internal citation omitted)). "'Irreparable injury must be either 'presently threatened' or 'imminent'; injuries that are prospective only and might never occur cannot form the basis of a permanent injunction.'" *Id.* (quoting *National Lumber & Building Materials Co.*, 798 A.2d at 434 (internal citation omitted)).

Plaintiffs argue that Defendants' failure to comply with the specific notice requirements of § 45-22.2-13(e)(2) deprived them of an opportunity to be heard prior to the enactment of the Emergency Ordinance and was in violation of the due process and equal protection clause of the Rhode Island Constitution, and, therefore, "the irreparable harm prong is satisfied because of the constitutional dimension of the deprivation." Pls.' Mem. Supp. Mot. Injunctive Relief at 25 (Mar. 5, 2020).

For their part, Defendants contend that the Emergency Ordinance presents no actual threat of imminent irreparable injury to Plaintiffs. Defs.' Suppl. Mem. at 21-22; Defs.' Mem. at 16. They argue that Plaintiffs have an adequate remedy at law and that, "even if the Building Moratorium is ultimately found to have been improperly imposed, the Plaintiffs can present evidence of monetary damages in the form of 1ost income occasioned by any purported delay in construction." *Id.* According to Defendants, "the damages would be the amount of lost rental income, and added interest payments on loans occasioned by the delay in construction caused by the Building Moratorium." Defs.' Mem. at 16.

Here, Plaintiffs have established a likelihood of success, on a prima facie basis, that the Town failed to institute a moratorium in accordance with the procedures set forth in § 45-22.2-13(e); the Town failed to provide the Plaintiffs with the notice required by § 45-22.2-13(e)(2); the enactment of the Emergency Ordinance was not authorized by the Town Charter; and that the enactment of the Emergency Ordinance was arbitrary and capricious and not related to a legitimate government interest. It is true, as Plaintiffs suggest, that "[w]hen an alleged deprivation of a constitutional right is involved, such as the right to free speech or freedom of religion, most courts hold that no further showing of irreparable injury is necessary." 11A Wright & Miller, *Federal Practice and Procedure* § 2948.1 (3d ed. 2020). However, our state Supreme Court has never held as much, in particular with respect to constitutional claims that do not involve First Amendment rights.

However, based on the arbitrary and capricious process by which Defendants sought to deal with complaints by neighbors concerning the development of Plaintiffs' property—by enacting a complete building moratorium on a subset of residential building projects in the Town rather than utilizing the then-existing ordinances to consider Plaintiffs' applications in the normal

course—without a demonstration of any imminent serious threat to the general welfare of the Town that could not be dealt with by those existing ordinances, the Court finds that the irreparable harm prong has been satisfied in this case. Forced into litigation, and clearly singled out by this draconian measure, Plaintiffs' ability to obtain monetary damages as compensation for their troubles, as Defendants contend, is not sufficient to remedy the egregious wrongs committed by Defendants in this case.

C

Balance of the Equities and Status Quo

Because Plaintiffs have established a likelihood of success on the merits on most of their claims and a risk of irreparable harm, this Court next considers the balance of the equities and the status quo. *Fund for Community Progress*, 695 A.2d at 521. Although these are sometimes articulated as two separate elements, *see, e.g.*, *Iggy's Doughboys*, 729 A.2d at 705, the Rhode Island Supreme Court has suggested that the status quo should be considered as part of the consideration of the equities. *Fund for Community Progress*, 695 A.2d at 521 ("In considering the equities, the hearing justice should bear in mind that 'the office of a preliminary injunction is not ordinarily to achieve a final and formal determination of the rights of the parties or of the merits of the controversy, but is merely to hold matters approximately in status quo, and in the meantime to prevent the doing of any acts whereby the rights in question may be irreparably injured or endangered.'" (quoting *Coolbeth*, 112 R.I. at 564, 313 A.2d at 659)).

The harm to Plaintiffs if the requested relief is not granted is limited to a further delay in the consideration of their demolition and building permit applications. Plaintiffs have also established a prima facie case as to the continuing deprivation of their constitutional rights based on the enactment of the Emergency Ordinance in response to their building permit applications.

Considering the hardship to Defendants if the requested relief enjoining enforcement of the Emergency Ordinance is granted, it is notable that the Town had the opportunity to consider adopting rules regarding floor-area-ratio for future development mentioned in their 2017 Comprehensive Plan, (Town of Narragansett Comprehensive Plan: Road Map 74-75), but it failed to take action until January of 2020, in the face of the complaints brought to the Town Council by neighbors concerning these specific Plaintiffs' building permit applications and proposed developments. *See* Defs.' Suppl. Mem. at 7-8. According to the Defendants, "[i]mmediately following the enactment of the Building Moratorium, the Town started working on solutions to the serious issue," which ultimately produced "a series of proposed amendments to the zoning ordinances intended to place limitations on the size of proposed structures based on both [floor area ratio] concepts, and [rules regarding off-street parking]." Therefore, the Town has the ability to adopt these and other new ordinances, as well as to enforce existing ordinances, in order to alleviate the ills that Defendants complain of concerning the rental of homes in residential neighborhoods to large numbers of college students. Indeed, the Town has an existing ordinance at its disposal that deals with concerns regarding renting large single-family residences to large numbers of college students, which restricts the definition of "household" to a maximum of four unrelated people. Narragansett Code of Ordinances, Appendix A–Zoning § 2.2(b). Thus, the hardship of the enjoining of the enforcement of the Emergency Ordinance is not significant under the facts of this case.

The Court must also determine whether the granting of injunctive relief would adversely affect the public interest. Generally, if a party is otherwise entitled to injunctive relief and the injunction would not negatively affect the public interest, the injunction may be issued. 42A C.J.S. *Injunctions* § 95 (2020). Defendants claim that enjoining enforcement of the Emergency Ordinance

will harm the public's interest in the "preservation of neighborhoods, and avoiding threats to its safety, general quality of life, and affordability of housing." (Defs.' Suppl. Mem. at 22.) However, given that Plaintiffs' building permit applications have yet to be approved, the issuance of an injunction will not be immediately detrimental to the preservation of neighborhoods in Narragansett. The Town has not articulated why the consideration of building permit applications under the Town's existing ordinances, or even how the construction of large single-family homes in the Town, poses a threat to anyone's safety or general quality of life; those concerns instead appear to be about the *use* of those large single-family homes—being rented to large numbers of people. *See* Defs.' Suppl. Mem. at 15-16 (asserting that "cramming . . . so many students into one single-family home naturally has the effect of super-charging the long standing issues with student and seasonal renters," and that "the increasing scale of the *rental homes* has caused concerns over fire safety issues." (Emphasis added.)).

Therefore, Defendants have failed to demonstrate how returning to the previous procedure for the processing of building permit applications would immediately detrimentally affect the safety or general welfare of the citizens of the Town. Defendants maintain that there is a genuine and significant public interest in maintaining the safety and quality of its residents, and that these interests can be maintained by enforcing the status quo of the Emergency Ordinance. *See* Defs.' Suppl. Mem. at 21-22. Specifically, Defendants allege that "the public has a strong interest in the preservation of neighborhoods, and avoiding threats to its safety, general quality of life, and affordability of housing [and] enjoining the Building Moratorium before the Bulk Zoning Amendments can be finalized and enacted will undermine, rather than preserve, the status quo before a full determination on the merits." *Id.* at 22.

However, the status quo is not represented by the moratorium remaining in effect. In cases where a defendant has wrongfully interfered with a right of the plaintiff to carry on a course of action, the relevant "status quo" is the state of affairs *prior* to the wrongful act of the defendant. *See School Committee of Town of North Kingstown v. Crouch*, 808 A.2d 1074, 1077 (R.I. 2002) (listing the final element for a preliminary injunction as "whether the issuance of a preliminary injunction served to preserve the status quo *ante*") (citing *Iggy's Doughboys*, 729 A.2d at 705); *see, e.g.*, *Allaire v. Fease*, 824 A.2d 454, 457-58 (R.I. 2003) (granting of a preliminary injunction which prevented defendants from obstructing a passageway on their property, over which plaintiff claimed a prescriptive easement, "serve[d] to preserve the status quo"). Thus, the relevant status quo is not the state of affairs with the Emergency Ordinance in place but rather, the state of affairs prior to its wrongful enactment and extension.

An injunction enjoining enforcement of the Emergency Ordinance would not prevent the Town from lawfully granting or denying building permits in accordance with its existing zoning ordinances and comprehensive plan. It also would not prevent the Town from enforcing its existing zoning ordinances regarding the number of unrelated people who may live in a single-family residence or passing a new ordinance to enforce a similar rule going forward. Thus, the status quo is not disrupted by issuing the requested injunctive relief.

Thus, there has been no showing of harm to the public interest which weighs against the issuance of the requested injunctive relief.

IV

Conclusion

For the reasons stated herein, this Court grants Plaintiffs' motion for injunctive relief pursuant to Rule 65 of the Superior Court Rules of Civil Procedure to enjoin enforcement of the

Emergency Ordinance. This Court denies Plaintiffs' motion for injunctive relief as to their request that the Town grant their building permit applications, as those applications should be allowed to be processed by the Town in the normal course in accordance with the Town's existing ordinances and the General Laws.

Counsel shall submit an order consistent with this Decision.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	29 Sylvan, LLC and 33 Sylvan, LLC v. The Town of Narragansett, et al.
CASE NO:	WC-2020-0112
COURT:	Washington County Superior Court
DATE DECISION FILED:	November 13, 2020
JUSTICE/MAGISTRATE:	Taft-Carter, J.
ATTORNEYS:	
For Plaintiff:	Michael A. Kelly, Esq.; Joelle C. Rocha, Esq.; Andrew G. Blais, Esq.; Michael Resnick, Esq.
For Defendant:	Andrew H. Berg, Esq.